Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	CC Docket No. 98-146

COMMENTS OF ADELPHIA BUSINESS SOLUTIONS, INC. IN RESPONSE TO THIRD NOTICE OF INQUIRY

John B. Glicksman, Vice President and General Counsel
Terry Romine, Director, Legal and Regulatory Affairs
Adelphia Business Solutions, Inc.
One North Main Street
Coudersport, Pennsylvania 16915
(814) 274-9830

Burt A. Braverman
Scott Thompson
Erik J. Cecil
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW – Suite 200
Washington, DC 20006
(202) 659-9750

Attorneys For
Adelphia Business Solutions, Inc.

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TABLE OF CONTENTS

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Pursuant to the Commission's Third Notice of Inquiry ("NOI") in this docket, Adelphia Business Solutions, Inc. ("ABS") submits these comments regarding the state of deployment of advanced telecommunications facilities. As ABS explains, the intransigence of ILECs, who profit from delaying CLEC deployment of facilities-based alternatives to their own networks, and the unreasonable demands of local franchising authorities, who condition CLEC entry to local markets upon acquiescence to unreasonable monetary and in-kind demands, have obstructed ABS' efforts to "reasonably and timely" deploy advanced telecommunications facilities. Without prompt and decisive action by this Commission, CLECs such as ABS will continue to be hampered in bringing competition to local markets, while many other CLECs likely will not survive the current market cycle.

I. INTRODUCTION AND SUMMARY

ABS is one of the largest facilities-based competitive local exchange carriers ("CLECs"), providing advanced telecommunications services to business customers in thirty states. Since its inception in 1991, ABS has overcome a multitude of business, technological and legal hurdles to create a vibrant, state-of-the-art fiber optic network that now covers 8,000 fiber route miles in its operating markets. In many cases, ABS brings fiber directly to its customers, who enjoy a full suite of advanced telecommunications services. ABS serves customers outside of the reach of its fiber optic facilities by leasing unbundled transport and loops from incumbent local exchange carriers ("ILECs"). Over time, ABS hopes to construct fiber optic facilities directly to these customers as well.

The fundamental soundness of ABS' business plan is widely recognized. Dean Whitter & Co., for example, recently recognized the intrinsic value of ABS' strategy. Where ABS has been able to enter a market and has had sufficient time to recover initial costs of market entry, facilities deployment and interconnection, ABS has become EBITA positive – usually within 18 to 24 months after market entry. However, ILECs' anticompetitive practices, and municipalities' unreasonable demands and delays, are significantly interfering with ABS' ability to deploy facilities in a timely and economic manner in many local markets.

Five years ago, in enacting the Telecommunications Act of 1996 ("the 1996 Act"), Congress promised to "accelerate deployment of advanced telecommunications services to all Americans by opening all telecommunications markets to competition."[1] At the heart of that promise was Congress' goal to ensure that Americans reaped the benefits of competitive offerings of advanced telecommunications services bundled with local, long distance and data services. Such competition would be possible only where competitors could rationally deploy

[1] S. Conf. Rep. No. 104-230 at 1 (1996).

and subsequently connect their facilities to the public switched telephone network ("PSTN"). This goal has not changed, nor has the Commission failed at any point during this period to recognize the fundamental importance of Congress' objective. To date, the Commission has taken some important steps toward this goal and *it has committed itself to taking additional steps, if necessary.*[2] Perversely, however, the Act has become a competition-delaying tool rather than a market-opening tool.

None would dispute that facilities-based, and even resale, local telecommunications markets have developed much more slowly than Congress or the Commission anticipated. In these comments, ABS addresses three of the most significant reasons for the slowed development of competitive telecommunications facilities, and the actions that must be taken immediately by the Commission if competitive local exchange carriers such as ABS are to have a fair chance of achieving Congress' vision.

First, in conjunction with, and in significant part as a result of, the barriers erected by ILECs and local authorities, the deployment of advanced telecommunications infrastructure and services has been hampered by the reduction in investment capital needed to deploy new networks and new services. Delays to market caused by ILECs and municipalities, as addressed below, have resulted in a loss of confidence by the investment community and a resulting decrease in available capital. Given those factors, and current market conditions, capital investment from Wall Street is available only to fully funded business plans. In ABS' case, but for those amounts either unlawfully withheld or deliberately overbilled by the dominant ILECs, ABS could be fully funded and eligible for hundreds of millions of additional investor dollars.

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[2] *See Promotion of Competitive Networks in Local Telecommunications Market, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 2000 FCC LEXIS 5672, *6-7 (FCC Oct. 25, 2000).

Nevertheless, the ILECs' dilatory tactics are working, and ABS has been forced to scale down the number of markets to which it will introduce its competitive services, to cut back on planned construction in its existing markets, and to make its service offerings less robust. This harms not only ABS, but also the public.[3]

Second, continued ILEC opposition to complying with even the simplest of the Act's requirements has slowed or reversed CLEC deployment of advanced telecommunications infrastructure, technology and services. As widely discussed and well-documented, the nation's dominant ILECs have succeeded in driving up CLEC market entry costs to the point of no return.[4] ILEC delays have directly and unmistakably diminished CLECs' investment in backbone, middle mile, last mile and the last 100 feet of telecommunications networks. In ABS' case, ILECs have delayed facilities-deployment required by the Act, withheld vast sums of payments due to ABS (including tens of millions of dollars in valid, state commission-affirmed reciprocal compensation payments) despite ABS' clear and unrefuted demonstrations of compliance with all ILEC ordering requirements, and overbilled and refused to refund to ABS hundreds of thousands of dollars per month on circuits they agree are properly qualified as

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[3] *Who Gets Hurt by Telecom's Troubles?* Business Week (April 23, 2001) *available at* http://www.businessweek.com/magazine/content/01_17/b3729011.htm (Citing problems caused by the telecom downturn for equipment makers, contract manufacturers, component makers, broadband customers, content companies, and lenders).

[4] *See e.g.,* Steve Rosenbush and Peter Elstrom, *8 Lessons from the Telecom Mess (Deregulation simply isn't working)*, Business Week, (August 13, 2001) *available at* http://www.businessweek.com/magazine/content/01_33/b3745001.htm; James K. Glassman, *Who's To Blame For Broadband Crisis? Wired Article Points To Bells*, Tech Central Station (April 23, 2001), *available at* http://www.techcentralstation.com/NewsDesk.asp?FormMode=MainTerminalArticles&ID=63; Seth Schiesel, *Sitting Pretty: How Baby Bells May Conquer Their World,* New York Times (April 22, 2001) a*vailable at* http://www.nytimes.com/2001/04/22/technology/22TELE.html; *Local Telephone Competition Still on Hold: Monopoly Phone Companies and High Cost Pre-Paid Service Dominate Residential Market Five Years After Launch of Competition*, Consumers Union (January, 2001) *available at* http://www.consumersunion.org/telecom/local.htm (Examining failure of local competition in Texas); *Local Phone Competition Before the Senate Comm. on Commerce, Science, and Transportation*, 107th Cong. (2001) (Testimony of Gene Kimmelman, Co-Director, Washington Office, Consumers Union) ("***It now appears that not only small competitive carriers, but the likes of Sprint, Worldcom and AT&T long distance are either on the ropes financially or likely to be taken over by one of the large local phone companies***. So long as the high costs and technical problems related to cable, wireless, Internet telephony or other technologies persist, ***the only way to sustain potential facilities competitors is to prohibit Bell entry into long***

unbundled network elements. Although the balance of these comments is focused on how the ILECs have severely constrained ABS' efforts to make economic use of Enhanced Extended Links ("EELs"), these problems are indicative of ABS' -- and other CLECs' -- broader difficulties with securing ILEC compliance with the Act generally.

Third, there exists a less publicized, but no less important, problem at the local level. Like the ILECs who stand as gatekeepers to the monopoly local loop, many local franchising authorities ("LFAs") have positioned themselves as gatekeepers to the public rights-of-way, access to which is equally as essential to the development of facilities-based competition as access to the local loop. Many LFAs have astutely recognized that prompt introduction of infrastructure investment and competition will provide short and long-term benefits for their citizens and the nation, and have conscientiously discharged their duties under the 1996 Act. Unfortunately, too many other communities have ignored the will of Congress, and the benefits that would inure to their citizens from the introduction and development of competition. Exerting the leverage that they possess through their bottleneck control over the public rights-of-way, these municipalities have sought to coerce the payment of both monetary and in-kind tribute, wholly unrelated in spirit or magnitude to their actual costs of regulating CLECs' use of the rights-of-way. Even more insidiously, some municipalities have discriminated against CLECs and new entrants in favor of locally entrenched ILECs or municipally owned utility companies looking to enter the telecommunications market themselves. In a world where time-to-market is crucial, too many municipalities have created substantial delays, and imposed discriminatory requirements, that have effectively prevented CLECs, such as ABS, from offering telecommunications services in the local markets. In these comments, ABS illustrates several common problems that it has encountered with municipal delay.

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distance until competitors are able to use the Bell infrastructure in approximately the same manner and under

The Commission has the ability, through pending complaints and investigations under Section 253 of the Act, and through its regulation of EELs and other inter-carrier access and compensation issues, to help create an environment that will allow ABS and other CLECs to deploy advanced facilities and services without impediment, and by so doing, encourage a renewed willingness of the financial markets to invest the capital necessary to bring about the goals of the 1996 Act. Only in that manner will the public ever enjoy the benefits of the truly competitive local telecommunications marketplace that Congress had in mind in enacting the Telecommunications Act of 1996.

II. CLECs' DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS SERVICES WILL CONTINUE TO BE DELAYED, AND ILECS WILL FURTHER CONSOLIDATE THEIR CONTROL OF THE MARKET, UNLESS THE COMMISSION TAKES PROMPT AND DECISIVE ACTION.

In dealing with the marketplace and regulatory obstacles raised by ILECs, who seek to preserve their local monopolies, and the barriers erected by overreaching local franchising authorities, who seek to extort unreasonable monetary and in-kind concessions, ABS and other CLECs have had to surmount overwhelming odds in the five years since passage of the 1996 Act.

Undaunted, CLECs have persevered. Putting fiber on poles and in the ground, establishing local infrastructure, and marketing to local businesses, CLECs have invested billions of dollars in attempting to make the competition envisioned by the Act a reality. That investment, and those efforts, began to bear fruit, with CLECs capturing market share, albeit small. While revenues were limited, and profits nonexistent, CLECs were able to continue their forward progress because of the confidence placed in them by the financial markets, and the capital that such investment provided for facilities construction.

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the same financial conditions as the Bell company itself").

Now, however, that bubble has burst. In March 2000 CLEC market capitalization reached its pinnacle, estimated at $242 billion.[5] As of June of this year, CLEC market capitalization had dropped approximately 83% to $38 billion.[6] ABS, while on more solid footing than many other CLECs, has had to weather its own decline in capital value. Approximately 18 months ago, on March 14, 2000, ABS' stock price was $60.75 per share, giving it a market capitalization of approximately $8.17 billion. As of September 24, 2001, ABS' stock was down to $1.42 per share, and its market capitalization had sunk to approximately $190 million. As a result, although ABS continues to execute its business plan, it has announced that it has scaled back that plan from 200 markets to 80, sell $125 million in assets, and reduce its capital spending for 2002 from $420 million to $235 million, and by another $100 million in 2003. That reduction in spending will also result in decreased investment in long haul fiber, elimination of further investment in approximately ten of its existing markets and redeploying assets in those markets to other markets. ABS also announced reductions in further expansion of local fiber rings and decreased equipment purchases**.** These reductions are targeted for markets where ABS did not anticipate becoming EBITA positive until 2003, and will cut unfunded free cash flow deficit to approximately $80 to $280 million.

Notwithstanding these cutbacks, ABS is one of the more fortunate CLECs. In the past year, nearly one and one-half dozen providers of advanced telecommunications capabilities have declared bankruptcy, a number have been delisted from the Nasdaq, and many have closed down completely. For example, as of June 1, 2001, the following firms had filed for bankruptcy protection:

- ICG Communications
- Digital Broadband Communications

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5 James K. Glassman, *Broadband Failure Has A Political Cause*, Wall Street Journal, June 21, 2001.

6 *Id.*

- NETtel
- NorthPoint Communications
- Omniplex Communications Group
- e.spire Communications
- ConnectSouth Communications
- Advanced Radio Telecom
- Pathnet Telecommunications, Inc.
- Actel Integrated Communications, Inc.
- WinStar Communications, Inc.
- @Link Networks
- Telscape International, Inc. (a firm that specialized in services for the Hispanic community)
- North American Telecommunications Corp.
- Teligent, Inc.[7]

Moreover, since June of this year, twenty-one CLECs have applied to this Commission for authority to discontinue services in part or all of their territories:

- Universal Access, Inc. d/b/a Pacific Crest Networks, Inc.[8]
- Sprint Communications Company L.P.[9]
- Urban Media Long Distance, Inc.[10]
- Hertz Technologies, Inc.[11]
- Mpower Communications Corp.[12]
- Rhythms Links, Inc.[13]
- Opus Correctional, Inc. [14]
- LineDrive Communications, Inc.[15]

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[7] Mark H. Reddig, *annus Horribilis? However You Say It, CLECs Have Had A Bad Year*, CLEC.com, June 1, 2001 http://www.clec.com/newsjump.asp?showpreview=y&top=y&contentid=2147442497.

[8] *Universal Access, Inc. d/b/a Pacific Crest Networks, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-525 (Filed September 10, 2001) (Public Notice, DA 01-2194, September 19, 2001).

[9] *Sprint Communications Company L.P. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-522 (Filed August 29, 2001) (Public Notice, DA 01-2182, September 18, 2001).

[10] *Urban Media Long Distance, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-520 (Filed August 17, 2001) (Public Notice, DA 01-2181, September 18, 2001).

[11] *Hertz Technologies, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-521 (Filed July 31, 2001) (Public Notice, DA 01-2118, September 7, 2001).

[12] *Mpower Communications Corp. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-519 (Filed August 15, 2001) (Public Notice, DA 01-2011, August 24, 2001).

[13] *Rhythms Links, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-517 (Filed August 10, 2001) (Public Notice, DA 01-2009, August 24, 2001).

[14] *Opus Correctional, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-518 (Filed August 9, 2001) (Public Notice, DA 01-2010, August 24, 2001).

[15] *LineDrive Communications, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-515 (Filed August 6, 2001) (Public Notice, DA 01-1989, August 23, 2001).

- 2nd Century Communications, Inc.[16]
- DSLnet Communications, LLC[17]
- GST Telecommunications, Inc. [18]
- Network Access Solutions Corporation and Network Access Solutions L.L.C. [19]
- Onsite Access Local, LLC[20]
- Log On America, Inc.[21]
- Pathnet, Inc. and Pathnet Operating, Inc.[22]
- Bluestar Communications, Inc. and Bluestar Networks, Inc.[23]
- Teligent, Inc., and Its Domestic Subsidiaries[24]
- Nushagak Long Distance[25]
- Communications Design, Inc.[26]
- Cable & Wireless USA, Inc.[27]

No CLEC is immune. Even among those that have not filed for bankruptcy, the financial impact has been staggering.

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[16] *2nd Century Communications, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-512 (Filed July 25, 2001) (Public Notice, DA 01-1988, August 23, 2001).

[17] *DSLnet Communications, LLC Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-516 (Filed July 20, 2001) (Public Notice, DA 01-1957, August 16, 2001).

[18] *GST Telecommunications, Inc. and Its Subsidiaries Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-511 (Filed July 20, 2001) (Public Notice, DA 01-1799, July 27, 2001).

[19] *Network Access Solutions Corporation and Network Access Solutions L.L.C. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-510 (Filed July 19, 2001) (Public Notice, DA 01-1754, July 23, 2001).

[20] *Onsite Access Local, LLC Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-513 (Filed July 18, 2001) (Public Notice, DA 01-1917, August 10, 2001).

[21] *Log On America, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-507 (Filed July 2, 2001) (Public Notice, DA 01-1679, July 13, 2001).

[22] *Pathnet, Inc. and Pathnet Operating, Inc. To Discontinue Domestic Telecommunications Services Not Automatically Granted*, Application, NSD File No. W-P-D-503 (Filed June 29, 2001) (Public Notice DA 01-1869, August 3, 2001).

[23] *Bluestar Communications, Inc. and Bluestar Networks, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-506 (Filed June 25, 2001) (Public Notice, DA 01-1630, July 10, 2001).

[24] *Teligent, Inc., and Its Domestic Subsidiaries Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-514 (Filed June 15, 2001) (Public Notice, DA 01-1919, August 10, 2001).

[25] *Nushagak Long Distance Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-505, DA 01-1629 (Filed June 13, 2001) (Public Notice, DA 01-1629, July 10, 2001).

[26] *Communications Design, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-504 (Filed June 11, 2001) (Public Notice, DA 01-1618, July 9, 2001).

[27] *Cable & Wireless USA, Inc. Application to Discontinue Domestic Telecommunications Services*, Application, NSD File No. W-P-D-499 (Filed June 1, 2001) (Public Notice, DA 01-1617, July 9, 2001).

All is not well in CLEC-land. Competition is not vibrant, and it is not succeeding. Across the spectrum of business plans, target markets, geography, technology and financial capability, CLECs are failing in record numbers. Despite their diversity, they share one common weakness: they must rely upon the good faith of this nation's ILECs and numerous local franchising authorities for access to the PSTN and local markets. This is not an industry shakeout as much as it is an industry shakedown.

In this setting, the concerns addressed by ABS in these comments take on more urgency than ever. ILECs continue to hammer away at CLECs in myriad ways, including, as described below, their denial of access to UNEs and EELs. And many municipalities continue to abuse the franchising process in pursuit of tribute that Section 253 of the Act forbids. But now, unlike the glory days of the bull market, CLECs cannot simply dig into their deep capital pockets.[28] Indeed, many have nearly, if not already, run out of money, which of course is just what the ILECs want. And so, strong, swift and decisive action by the Commission is needed ***now*** to foster an environment in which CLECs can enter local markets free from unreasonable LFA demands, obtain timely and cost-effective access to UNEs and EELs, and begin to generate the kind of financial returns necessary to attract the new investment necessary to fund CLECs' deployment of their advanced telecommunications networks.

Unfortunately, prompt and decisive action has not been forthcomiong from the Commission thus far. Despite the Commission's establishment of the Accelerated Docket, only two disputes have been accepted for expedited resolution since its creation in 1998. Moreover, lengthy and costly formal complaint proceedings, at the state or federal level, have resulted in little significant change in ILEC behavior. More often than not, fines or other FCC enforcement actions such as consent decrees have been largely of no consequence to the ILECs. To the extent

a decision is unfavorable, they can (and do) appeal or pay whatever paltry fines are imposed – – it is simply a cost of doing business. Moreover, ILECs know that litigation costs disproportionately disable their smaller competitors, and that state and federal regulators have thus far been unwilling to impose anything more than nominal penalties. For example, both SBC and Verizon continue to pay fines for non-compliance with the FCC's merger conditions, rather than make responsive and good faith attempts to implement the market opening conditions that they *voluntarily* agreed to as a condition of their respective mergers.[29]

In short, no CLEC, however experienced, financially disciplined and technically qualified, currently poses a credible competitive threat. The nation's efficient and intelligent capital markets will invest where investments can grow. In the case of competitive telecommunications and in light of these well-known and well-publicized deficiencies, all have reached the same conclusion: money invested in competitive telecommunications cannot grow at this time.

III. ILECs ARE VIOLATING THE ACT, AND THE COMMISSION'S REGULATIONS AND ORDERS, WITH IMPUNITY BECAUSE DELAY IS MORE PROFITABLE THAN COMPLIANCE.

A. ILECs Continue To Deny Access To Their Facilities And Refuse To Repay CLECs For Amounts Lawfully Due.

At every level, ILECs have and retain the upper hand. Where payments are due to CLECs, they delay payment, withhold amounts due or refuse payment even in the face of state PUC orders. Currently, for example, ILECs are withholding tens of millions of dollars owed to

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[28] *See e.g.* Peter Elstrom, *Telecom Meltdown*, Business Week (April 23, 2001) *available at:* http://www.businessweek.com/magazine/content/01_17/b3729007.htm.

[29] *See, e.g. In the Matter of Verizon Communications, Inc*, DA 2079, File No. EB-01-IH-0236, Acct. No. 200132080058, Order (Rel. September 14, 2001) (Verizon fined $77,000 for failing to post information concerning exhaust of collocation space); *In the matter of SBC Communications Inc. Apparent Liability for Forfeiture*, FCC 01-184. File No. EB-00-IH-0432, NAL/Acct. No. 200132080011, (Rel. May 29, 2001) (SBC fined $88,000 because SBC has significantly overstated the accuracy of its filings in its annual report regarding its compliance with merger conditions); *In the Matter of BellSouth Corporation* , Order, FCC 00-389, File No. EB-00-IH-0134, Acct. No. X32080035 (Rel. November 2, 2000) (For more than six months in 1999, BellSouth failed to provide a competitor with cost data to support BellSouth's proposed prices for unbundled copper loops, despite the competitor's written request for such data).

ABS for ABS' costs of terminating ILEC traffic. Moreover, where ILECs have overbilled ABS and ABS has disputed these amounts, the ILECs have threatened to cancel, and in some cases have cancelled, services to ABS. Lastly, even where they do not dispute that ABS has overpayed them, they have refused to refund those amounts to ABS or even credit them to ABS in a timely manner.

1. Delays Continue Despite ABS' Good Faith And Best Efforts To Anticipate And Resolve Operational, Billing And Technical Issues.

Almost two years ago the FCC determined that CLECs' access to EELs was necessary in certain circumstances to foster competition.[30] Accordingly, ABS worked at length with ILEC account teams and technical personnel and developed, on an ILEC-by-ILEC basis, detailed manuals covering all aspects of pre-ordering, ordering, local use certification, commingling and technical issues related to each type of EEL that each ILEC stated would be made available. Since then, these ILECs have rendered the FCC's rules meaningless through inaction, non-responsiveness, picayune rejection of orders, and outright refusal to refund ABS overpayments.

For example, both Verizon and Bell South have refused to convert special access circuits to UNE pricing despite the fact that they do not dispute that the circuits fully qualify as EELs. To date, BellSouth still refuses to provide a commitment as to when it will provide ABS firm order confirmation ("FOC") dates for EELs conversion orders that ABS submitted nearly three and one-half months ago. As of September 24, 2001, BellSouth Account Managers have submitted *only three of ABS' nine worksheets* provided to BellSouth in June 2001 to the next level of review (Project Management) and only in the past few days have issued a FOC on *one* of

[30] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 278 (1999) ("*UNE Remand Order"*) ("[W]e find that requesting carriers are not impaired without access to unbundled local circuit switching when they serve customers with four or more lines in density zone 1 in the top 50 metropolitan statistical areas (MSAs), as set forth in Appendix B, where incumbent LECs have provided nondiscriminatory, cost-based access to the enhanced extended link (EEL) throughout density zone 1").

those worksheets. BellSouth's Project Managers will not issue any FOCs until they (1) complete their review of the BellSouth Account Team's review (and approval) of ABS EELs "worksheets", (2) manually issue "disconnected" orders regarding access billing, and (3) issue new orders to convert the existing circuits to UNE billing. In stark contrast, BellSouth can and does provision its tariffed Megalink service, which similarly provides loop and transport combinations, within ten days and states that it can provide unbundled DS-1 loops, for example, in five days.[31]

2. ILECs Unnecessarily Delay Provisioning Of Circuits.

Conversion involves a simple change in ILEC *billing* systems, which can be accomplished in hours. ILECs can provide comparable tariffed services within ten days; indeed, ILECs provision entire T-1 circuits within 15 to 20 days. Despite the relative ease of converting billing from one set of prices to another, Verizon East, for example, routinely issues "no facilities available" notices, which permit an additional 90 days for provisioning of circuits and exempt it from FCC-mandated performance measurements for loops and transport. Thus, Verizon can delay *at will* any CLEC requests for new circuits. Recognizing that ILECs sometimes need additional time in which to provide UNEs, ABS has offered to *negotiate reasonable extended timeframes* in which Verizon could provision circuits. Verizon, however, has only recently begun to entertain any such discussion, despite the fact that ABS for months has expressed its willingness to concede additional time for provisioning.

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[31] *See BellSouth Products and Services Interval Guide - 4D, Network & Carrier Services CG-INTL-001*, Issue 4D, § 5.1 (August, 2001), *available at* http://www.interconnection.bellsouth.com/guides/other_guides/html/gintl001/indexf.htm (Orders for five or more newly provisioned DS-1 EELs can be provided in 14 business days plus 1 business day for each additional circuit above 5; orders of 1-5 DS-1 loops can be provisioned within 5 days; 6 – 14 loops, within 7 days; negotiated intervals apply for orders of 15 or more loops); *cf Bell Atlantic Schedule Of Standard Minimum Intervals,* (February 9, 2000) *available at:* http://128.11.40.241/east/wholesale/resources/wc_00/attach/02_09a_attach.pdf (Digital data special access services for orders of 1 to 24 circuits are available within 9 business days of initial order).

3. ILECs Unnecessarily Delay Refunds Of CLEC Overpayments.

Typically, EELs circuits cost approximately 66% less than tariffed access circuits. Above and beyond the delay that ILECs introduce into the process of ordering an EEL conversion, ILECs steadfastly refuse to refund enormous CLEC overpayments for the period between the FOC date and the date on which EEL rates are finally invoiced. Instead, these overpayments are belatedly returned only in the form of credits on future services, thus allowing ILECs interest-free use of scarce and dwindling CLEC funds for periods of a year or more. For example, ABS submitted EELs conversion worksheets to Verizon in February 2001. Once converted, these circuits would allow ABS a savings of approximately $200,000 per month. Although Verizon issued a FOC on March 1, 2001 and assured ABS that it would change the billing, almost 7 months and approximately $1,400,000 in overpayments later, Verizon still has not refunded these amounts and has not even credited ABS for these overpayments.

4. ILECs Disconnect CLECs' EELs Customers At Will.

In yet another manifestation of ILEC anticompetitive behavior or, at best, *strategic incompetence*, ILECs have, on some occasions, disconnected ABS customers *after* completing ABS-requested conversions. In one case, ABS customers experienced outages of fifteen hours, due primarily to the fact that the ILEC, in that case, Ameritech-Illinois, refused to provide ABS with information regarding the cause of the outage. Three weeks later, Ameritech-Illinois disconnected another ABS customer based upon the same order. The effect of such disconnections on ABS and other CLECs is devastating. No customer cares about the cause of an outage; it simply wants reliable service. What remaining credibility CLECs possess in the marketplace following the extensively reported collapse of the industry is further undermined and often impossible to recover.

B. CLECs Can No Longer Afford Lengthy, Uncertain And Expensive Enforcement Efforts; Self Executing Remedies Are CLECs' Only Hope.

As ABS and many CLECs have amply demonstrated, each "restriction" on their ability to offer telecommunications services (*e.g.,* commingling, local usage, etc.) creates further opportunities for ILEC delay. ILECs have drained the economic usefulness of EELs from CLECs through systematic delay and studied non-compliance with the FCC's Rules. Moreover, such restrictions have also inhibited CLEC innovation and ability to deploy next generation facilities over EELs.

1. CLEC Self-Certification Must Be Presumptively Valid, And The FCC Must Lift Or Substantially Modify The Local Usage Restrictions To Prevent ILECs From Further Delaying EELs Conversions And Provisioning.

The FCC cannot permit ILECs to continue their stranglehold on the local exchange and exchange access markets through outright intransigence and delay. Once a CLEC certifies that circuits ordered as conversions or as new EELs from the ILEC comply with the limited use restrictions set forth in the Supplemental Order Clarification, ILECs must not be allowed to challenge that certification and further delay provisioning. As the FCC has stated, "the process by which special access circuits are converted to unbundled loop-transport combinations should be ***simple and accomplished without delay***."[32] ILECs simply cannot be allowed to be the final arbiter of CLEC compliance with local usage restrictions. It is paramount to the continued existence of facilities-based local exchange and exchange access competition that the FCC eliminate ILEC opportunities for gamesmanship. Additionally, the Commission should grant CLECs a "fresh look" at all existing special access circuits, allowing them to convert these circuits without penalty.[33] Furthermore, the FCC should permit CLECs to issue blanket self-

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[32] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order, 15 FCC Rcd 1760, ¶ 30 (1999) (emphasis added).

[33] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Comments of the Focal Communications Corporation, CC Docket 96-98, p. ii (April 5, 2001).

certifications, so that if a CLEC submits an order for 1,000 circuits, the self-certification would apply to all of the circuits ordered.[34]

2. The Commission Should Not Allow The Application of Commingling Restrictions To EELs.

Commingling restrictions are contrary to the Act. Under 47 USC § 251(c)(2), ILECs must provide UNEs in a manner that is "at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection." Thus, commingling restrictions improperly restrict CLECs' ability "to combine such elements in order to provide such telecommunications service[s]."[35] Moreover, the Commission's Rules specifically provide that "[a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."[36]

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[34] *EELs Supplemental Order* at ¶29 ("We clarify that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements. We do not believe it is necessary to address the precise form that such a certification must take, but we agree with ALTS that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification").

[35] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, ¶ 356 (1996) ("[S]ection 251(c)(3) permits interexchange carriers and all other requesting telecommunications carriers, to purchase unbundled elements for the purpose of offering exchange access services, or for the purpose of providing exchange access services to themselves in order to provide interexchange services to consumers. Although we conclude below that we have discretion under the 1934 Act, as amended by the 1996 Act, to adopt a limited, transitional plan to address public policy concerns raised by the bypass of access charges via unbundled elements, we believe that our interpretation of section 251(c)(3) in the NPRM is compelled by the plain language of the 1996 Act. ***As we observed in the NPRM, section 251(c)(3) provides that requesting telecommunications carriers may seek access to unbundled elements to provide a 'telecommunications service,' and exchange access and interexchange services are telecommunications services. Moreover, section 251(c)(3) does not impose restrictions on the ability of requesting carriers to combine such elements in order to provide such telecommunications service[s]. Thus, we find that there is no statutory basis upon which we could reach a different conclusion for the long term.***")

[36] *See* 47 C.F.R. § 51.309(a).

The current commingling restrictions force CLECs to incur unnecessarily expensive and lengthy delays because they are forced to order new UNE DS-3 circuits despite the fact that the CLEC already provides service over a tariffed special access DS-3, which is the exact same circuit they seek to convert. Special access circuits and EELs are the *exact same facilities*. Any ILEC distinction between them for purposes of ordering, provisioning and maintenance is artificial and should not be sanctioned by the Commission.

Commingling prohibitions simply allow ILECs to protect access revenues despite the fact that the FCC has repeatedly stated that it wants to eliminate access charges as well as intercarrier compensation altogether.[37] Moreover, according to the CALLS Order, there is no continued regulatory justification for protecting ILEC access revenues because these charges no longer support Universal Service subsidies.[38] Without these changes, ILECs will continue to play the rules to their advantage by forcing CLECs into lengthy provisioning delays.

C. Facilities-based Competition Is In Serious Jeopardy So Long As ILECs Can Violate The Act With Impunity.

Through their studied non-compliance with the Act and their passively slow response to the Act's requirements, the ILECs have thwarted the competitive pressures that the 1996 Act was intended to introduce. Not only do ILECs continue to game the rules, but CLECs have few realistic opportunities, and almost no ability, to enforce the Act's provision. For example, the

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[37] *See e.g., Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, ¶ 53 (Rel. April 27, 2001) (*CLEC Access Charge Reform Order*) ("One of the options under serious consideration in that proceeding is a move to a bill-and-keep regime, under which carriers would recover their costs from end users, rather than from interconnecting carriers"); *Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket No. 01-92, ¶ 4 (Rel. April 27, 2001) ("In this NPRM, we envision that a bill-and-keep regime would fulfill the goals of the two interim measures, combined with the larger goal of a unified regime").

[38] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board On Universal Service,* Sixth Report And Order in CC Docket Nos. 96-262 And 94-1, Report And Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 2000 FCC LEXIS 2807, ¶ 29 (May 31, 2000) ("In addressing these issues, the CALLS Proposal reduces, and in most instances eliminates, implicit subsidies among end-user classes; makes implicit universal service funding in access charges explicit and portable; provides significant benefits to consumers who make few or no long distance calls; and sets carrier charges at reasonable levels").

FCC established its Accelerated Docket Rules in 1998 to "stimulate the growth of competition for telecommunications services by ensuring the *prompt resolution of disputes* that may arise between market participants."[39] To date, however, according to Enforcement Bureau personnel, the FCC has accepted only *two* CLEC complaints onto the accelerated docket! Meaningful enforcement and meaningful penalties simply do not exist, although the FCC has recognized the need for both:

> ***We recognize that even minor delays or restrictions in the interconnection process can represent a serious and damaging business impediment to competitive market entrants***. Additionally, we believe that, in many instances, incumbent carriers also will have an interest in obtaining the prompt disposition of complaints filed against them that they may view as without substantial merit. By reducing the opportunity for this type of delay in the local exchange market, while respecting the jurisdiction of the respective state commissions, we believe that the Accelerated Docket will do much to assist in the development of the pro-competitive national policy framework that Congress envisioned when it enacted the 1996 Act. ***Additionally, we believe that the hearing-type proceeding discussed in the Public Notice will substantially aid parties' presentation of their claims and defenses in complaint proceedings, thereby speeding the Commission's decisions, while maintaining their high quality, in matters dealing with the important issues of telecommunications competition.***[40]

Investment in the competitive local exchange industry has dropped precipitously over the past 15 months, and increasingly few of the remaining CLECs have the financial resources or legal tools to bring advanced services to the American consumer, except in the most limited of circumstances. Unless and until the FCC establishes clear, enforceable and significant penalties for ILEC non-compliance, no competitor can simultaneously overcome the challenges of developing and investing in advanced telecommunications services and bringing those services to market while relying on ILECs who game the system with impunity to avoid complying with the Commission's rules.

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[39] *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers,* Second Report and Order, 13 FCC Rcd. 17018, ¶ 3 (1998) (emphasis added).

[40] *Id.* (emphasis added).

IV. MANY LOCAL FRANCHISING AUTHORITIES ARE ERECTING BARRIERS TO LOCAL MARKET ENTRY AND, THEREBY, ARE IMPEDING THE DEPLOYMENT OF ADVANCED TELECOMMUNICATIONS CAPABILITY.

While less publicized than the tactics of the ILECs, barriers to local market entry erected by many municipal franchising authorities have had an equally significant role in delaying the CLEC industry's deployment of competitive telecommunications facilities. Too many local authorities, often spurred on by consultants peddling "model" ordinances and promises of boundless telecom franchise fees, have placed themselves in the roll of toll takers on the road to advanced facilities deployment. Such municipalities have effectively delayed ABS and others for months, years, or in some cases indefinitely, from installing facilities and initiating service in many markets. While much has been submitted to the Commission regarding the unlawful "third layer" of regulation being imposed by municipalities, these comments will focus the Commission's attention primarily on the problem of municipal delays.

A. Examples Of Municipal Delays

ABS has faced delays of six months to a year, and more. As the following discussion highlights, ABS' experiences have run the gamut, from municipalities that have said either "we're thinking about the issue," or "we will not act on your application unless you acquiesce to our demands", to others that have delayed ABS in order to assist a municipal utility get to market before ABS.

1. "We're Thinking About The Issue"

Oldsmar, Florida

Oldsmar, Florida represents a typical example of a city delaying the market entry of a competitive telecommunications provider while the City considers adopting a new ordinance. Oldsmar is a suburb of Tampa, which is situated in the most densely populated county in Florida. Although ABS originally contacted the City in a letter dated March 8, 2000, as of today, some

eighteen months later, the City still has not processed ABS' request to use the public rights-of-way. After originally requesting that ABS modify a *cable* franchise agreement, the City then informed ABS that it was in the midst of adopting a telecommunications ordinance. Each time ABS contacted the City, the City claimed that it was just weeks away from finalizing an agreement. After repeatedly communicating with the City on this issue, and seven months after its initial request, ABS was informed that it could enter into an interim agreement while the City worked on an ordinance. Despite this assurance, the City changed its mind two months later and refused to permit ABS to use the rights-of-way absent a final agreement. In November 2000, the City assured ABS that a franchise ordinance would be forthcoming. At this time, the City has still not adopted an ordinance, but as of August, 2001, finally informed ABS that the City would allow ABS to go forward by obtaining construction permits.[41]

Culver City, California

Culver City initiated development of a multi-tiered right-of-way ordinance in June 2000. The ordinance was to be adopted in stages, beginning with a right-of-way "management plan." In the interim, the City refused to grant any construction permits until the ordinance was finalized and applications were granted pursuant to its new requirements. As of now, *almost fifteen months* after it began, the City has yet to complete work on the ordinance.

ABS' history with the City goes back even farther. ABS first contacted the City by letter dated February 18, 2000, in which ABS introduced itself as a facilities-based carrier interested in providing business communications services within the City. ABS made a follow-up call on April 11, 2000, and the City informed ABS that the City Attorney was working on a response to the letter. Shortly thereafter, ABS was invited by the City's Telecommunications Task Force to

[41] Of course, this raises the problem of whether to go into the community, investing in infrastructure, when the City may adopt unlawful and burdensome ordinance provisions in the very near future. That uncertainty is a further impediment to development.

discuss the Company's plans for the City. The meeting took place on May 31, 2000, at which the City told ABS that a telecommunications ordinance was under development and that it was unlikely that ABS would be able to obtain a construction permit before the ordinance was completed. The proposed timeframe for the ordinance at that time was allegedly "end of the summer."

In July 2000, ABS received an invitation to participate in an industry roundtable on the ordinance. ABS reviewed and submitted comments on the proposed ordinance, which turned out to be a lengthy right-of-way management plan—despite being just the first component of the ordinance. ABS also participated in the roundtable discussion. The plan was adopted in August. In September, the City invited ABS back for comment on the second phase of the ordinance, an umbrella Telecommunications Regulatory Requirements Ordinance. The umbrella ordinance incorporated the right-of-way management plan and *required five subsequent ordinances* delineating varying regulatory schemes for telephone companies, data companies, pass-through carriers (*e.g.*, dark fiber providers), OVS providers, and cable operators. In October, the City passed the umbrella ordinance and held over the telephone ordinance after opposition from industry.

While the City has since adopted the "pass-through" ordinance and more recently, ABS believes, the cable ordinance component, neither of these sub-ordinances helps ABS because ABS has declared an intention to provide services within the City. Only carriers that are constructing exclusively pass-through/long haul facilities are permitted to build in the City. The de facto moratorium remains in effect for all others. Thus, a*fter nearly nineteen months*, ABS still has no means for accessing the City's rights-of-way.[42]

[42] In response to comments in the *City Signal* dockets, like ABS', that exposed the City's inaction, the City of Culver City, through NATOA, filed reply comments purporting to explain its behavior and lashing out at the CLECs that had identified it as a problem. *See* Reply Comments of the National Association of Telecommunications Officers and Advisors; Chandler, AZ; Burbank, Culver City, Glendale, Richmond and Walnut Creek, CA; Jefferson

2. "Unless You Acquiesce, Your Application Will Be Delayed"

Shreveport, Louisiana

On or about March 28, 2000, representatives of ABS met with the City Attorney of Shreveport, Louisiana. At that time, ABS was informed that it could move forward quickly if it agreed to the same franchise agreement as a previous provider (KMC Telecom), but if it wished to negotiate any of the terms it would be a long, drawn out process. ABS attempted to contact the City four times over the next month, but received no response. ABS reluctantly decided to accept the agreement "as is" and submitted an application on April 26, 2000. ABS again attempted to contact the City, leaving approximately eight telephone messages and sending two letters over a period of eleven weeks.

The second letter, dated July 11, 2000, threatened litigation and received an immediate response from the City. The City promised a status report on the status of ABS' application within one week. When ABS failed to receive the status report on time, it attempted once again to contact the City, leaving several telephone messages. On July 26, 2000, ABS received a fax from the City, stating that its application was in order and that the City would contact ABS by July 28, 2000. ABS received a similar fax on July 28, with a promise of another communication the following week. On August 2, 2000, the City telephoned ABS and promised to fax the KMC ordinance for ABS to review. On September 19, 2000, after several more telephone calls to the City, ABS received the KMC ordinance in the mail.

In January 2001, *ten months after initial contact*, and after several more calls by ABS to the City and still further delaying information requests by the City, ABS decided to abandon its

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Parrish, LA; Newton, MA; Dearborn, MI; and Clayton, MO (CC Dockets 00-253, 00-254, 00-255). As ABS explained in its Opposition To Motion To Strike (CC Dockets 00-253, 00-254, 00-255, Feb. 23. 2001), however, the City's and NATOA's response did nothing to justify the City's actions, and in fact simply affirmed and emphasized the problem that CLECs have encountered.

plans for Shreveport. The length of time and administrative delay contributed to ABS' decision to concentrate its efforts elsewhere.

3. Delay To Assist The Municipal Utility

Bristol, Virginia

ABS first contacted the City of Bristol, Virginia in March 2000, requesting permission to use public rights-of-way to construct a telecommunications system. For several months, despite ABS' efforts to separate negotiations for a city franchise from negotiations over a fiber lease agreement with the municipal utility, the City and the Bristol Utility Board delayed and obstructed negotiation of the franchise agreement in an attempt to pressure ABS in its negotiations for the fiber lease with the Utility Board. The difficulty with Bristol was compounded by the fact that ABS was unable to communicate with the City Solicitor. In August, the Solicitor's secretary informed ABS' outside counsel that the Solicitor would only communicate with the Utility Board regarding ABS' franchise. And the Utility Board's attorney informed ABS that he would only speak with local operations staff of ABS.

Finally, almost seven months after initial contact, ABS was informed that the City was to engage in a comprehensive study of "all controlling laws and regulations, as well as existing agreements in place." The City also stated that the study was scheduled to finish by the end of February 2001 (one year after ABS initially requested authorization). If and when the study is finished, ABS will have to begin the application and negotiation process anew. At this point, nearly 18 months later, while ABS is on the verge of working out a pole attachment agreement with the City's utility, it still has no authorization from the City itself.

ABS' experience with Bristol, Virginia is of particular concern because while the municipal utility was controlling ABS' attempt to enter the market, the City and the utility were also in federal district court seeking to overturn a state law that prohibited municipalities from

entering the telecommunications market. On May 16, 2001**,** the City succeeded in the district court, obtaining a declaration that Virginia Code § 15.2-1500 violated Section 253 of the 1996 Act by prohibiting the City from providing telecommunications services.[43] Incredibly, in its briefs in support of its suit, the City apparently asserted that it needs to be allowed to provide telecommunications services so that the City does not become a digital backwater.[44] Thus, it appears that the City has excluded competitive entrants, like ABS, in order to bolster its arguments for a change in law and to protect its own proprietary interests in entering the market itself.

4. Unwillingness To Act Promptly

Emeryville, California

The City of Emeryville passed its "Excavations and Encroachments in the Right-of-Way" Ordinance on June 20, 2000. This ordinance requires that the City Attorney draft an encroachment agreement for telecommunications providers to sign prior to receiving an encroachment permit. From July through October, this provision of the ordinance was waived and providers were still able to obtain permits. Providers, including ABS, were told repeatedly that they would have an opportunity to review and comment on the City Attorney's draft encroachment agreement. This invitation to review was made at each of the City's monthly utilities coordination meetings from July through October. Starting in November, however, the City stated that no further permits would be issued until providers, including ABS, signed the City's encroachment agreement. As of February 2001, the City had yet to finalize the draft agreement and distribute it to telecommunications providers. Based on the City's delay and subsequent developments in the financial markets, ABS has decided to put its expansion into Emeryville on hold for the time being.

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[43] *City of Bristol v. Earley*, 2001 U.S. Dist. LEXIS 6325 (W.D. Va. May 16, 2001).

Redwood City, California

The crux of the Redwood City delay has been the failure of the City to respond to ABS. On first contact, the City did not have an ordinance in place but requested that a "franchise" agreement be executed and approved by City Council. ABS obtained a copy of an encroachment agreement executed by Williams Communications. The agreement was provided by the City three months after ABS' initial request. An electronic copy of the agreement was sent to ABS to redline on July 10, 2000. ABS returned a redlined version of the agreement to the City Attorney the same day. Following the submission, ABS made repeated attempts to reach the City by telephone over a span of 60-days, in which messages were left by ABS but no return calls from the City were received. ABS sent the redlined version of the agreement by email twice during this same time. On September 7, 2000, the City Attorney agreed to a meeting with ABS and several City staff by telephone to discuss the redlined version. The meeting was held on September 12, 2000, and was attended by ABS and one member of the City's engineering department; however, the City Attorney failed to attend or even to instruct the staff member how to proceed. Subsequently, the City failed to provide any further information regarding the process for the approval of the agreement or a schedule for Council review. Based on the City's delay and subsequent developments in the financial markets, ABS has decided to put its expansion into Redwood City on hold for the time being.

B. To Remedy These Problems, The Commission Needs To Exercise Its Preemptive Powers Under Section 253(d).

While the particular facts and circumstances of each of the situations described above may vary, the consistent feature of all of these examples is the inordinate delay to which ABS has been subjected in attempting to secure municipal authorization for access to public rights-of-way. These delays have been motivated by a variety of factors, ranging from municipal

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[44] *See City of Bristol v. Beales*, 4th Circuit Record No. 01-1741, Joint Appendix at 181.

disinterest in the introduction of competitive telecommunications services by ABS, to the keenest interest in delaying ABS so as to provide an advantage to a municipal utility that was seeking to enter the telecommunications marketplace in competition with ABS. No matter what the motive may have been, each of these instances of delay has served to create a barrier to ABS' entry into these local telecommunications markets and has deprived the public of the competition that Congress sought to foster in enacting the 1996 Act.

To remedy this situation, the Commission needs to take a more affirmative role in the enforcement of Section 253. ABS commends the Commission for its decision to appear as an *amicus curiae* in the *TCG New York v. City of White Plains* appeal to the Second Circuit.[45] The Commission's firm stance on the need for competitively neutral and nondiscriminatory treatment of CLECs is critical for the future of the industry. But it must do *more,* and it must act swiftly. Section 253(d) grants the Commission jurisdiction to preempt the enforcement of any statute, regulation or legal requirement that creates a barrier to entry in violation of Section 253(a). 47 U.S.C. § 253(d). The Commission should affirmatively exercise that jurisdiction. Indeed, ABS fully supports the recommendation made by the Association of Local Telecommunications Services ("ALTS") in its Reply Comments to the Commission regarding the pending Section 253 complaints by City Signal[46] specifically, ALTS' proposal that the Commission adopt streamlined procedures for processing Section 253 complaints and provide for meaningful resolution of impediments erected by local authorities.[47] Moreover, the Commission should act promptly to resolve the Section 253 matters presently pending before it, and in so doing send a clear message that municipal abuses will not be tolerated. For example, in the pending City Signal dockets, the

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[45] Comments of Federal Communications Commission and United States As Amicus Curiae, (2d Cir. No. 01-7213(L), 01-7255(XAP) June 12, 2001).

[46] Reply Comments of Association of Local Telecommunications Services, CC Dockets 00-253, 00-254, 00-255 (filed Feb. 14, 2001).

[47] *Id.* at 27-29.

Commission has an opportunity to declare unequivocally that municipal delays are a barrier to entry in violation of Section 253(a). Such a declaration would be extremely helpful when ABS encounters resistance like that outlined above. Moreover, the Commission should resolve the long pending matter opened by the Wireless Bureau regarding access to rights-of-way,[48] and in so doing send an unmistakable message to municipalities and their consultants that the national interest in promoting the deployment of advanced telecommunications infrastructure and capability must not be undercut by local franchising authorities' parochial power plays and profit schemes.

[48] *Promotion of Competitive Networks in Local Telecommunications Markets*, *supra* note 2, at ¶¶ 70-84.

V. CONCLUSION

This Commission said that it was prepared to take additional steps, if necessary, to achieve the goals of the 1996 Act.[49] It is time for the Commission to take those actions.

Respectfully submitted,

John B. Glicksman,
Vice President and General Counsel

Terry Romine, Director, Legal and Regulatory Affairs

Adelphia Business Solutions, Inc.
One North Main Street
Coudersport, Pennsylvania 16915
(814) 274-9830

Burt A. Braverman
Scott Thompson
Erik J. Cecil

Cole, Raywid & Braverman, LLP

1919 Pennsylvania Avenue, NW – Suite 200
Washington, DC 20006
(202) 659-9750

Attorneys For
Adelphia Business Solutions, Inc.

September 24, 2001

[49] *See* note 2, *supra.*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20054

In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996	CC Docket No. 98-146

DECLARATION OF JOHN B. GLICKSMAN

I, John B. Glicksman, declare as follows:

1. I am Vice President and General Counsel Adelphia Business Solutions, Inc. ("ABS").

2. I have personal knowledge of the facts discussed in the Comments.

3. I attest that all of the facts recited in the Comments regarding ABS' experiences with incumbent local exchange carriers and local franchising authorities are true and correct to the best of my knowledge, information and belief.

John B. Glicksman, Vice President and General Counsel
Adelphia Business Solutions, Inc.

Executed September 24, 2001